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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on February 4, 1966.

OPINION BELOW

The opinion of the court of appeals (App. A., *infra*, pp. 1a–16a) is reported at 356 F. 2d 253. The opinion of the Federal Trade Commission (R. 61–64) [1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966 (App. B., *infra*, p. 17a). On May

[1] "R." refers to the two-volume Transcript of Record in the court of appeals.

5, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including July 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Finality Act of 1959, which amended the procedure for review and enforcement of Clayton Act cease-and-desist orders, repealed the authority of the Federal Trade Commission and the jurisdiction of the courts of appeals to enforce unreviewed orders issued prior to the amendment.

STATUTES INVOLVED

Section 11 of the Clayton Act, 38 Stat. 734, as amended prior to July 23, 1959, 15 U.S.C. (1958 ed.) 21, the Finality Act of 1959, 73 Stat. 243, and the General Savings Statute, Rev. Stat. 13, as amended, 1 U.S.C. 109, are set out in Appendix C, *infra*, pp. 19a–29a.

STATEMENT

Respondent manufactures men's, women's and children's apparel which are distributed to some 12,000 retail outlets located throughout the world (R. 25, 66). On September 4, 1958, respondent was charged by the Federal Trade Commission with having violated Section 2(d) of the Clayton Act by granting discriminatory advertising and promotional allowances to certain favored customers (R. 2–4). Respondent did not answer the complaint, but consented to the entry against it of a cease-and-desist order prohibiting further discrimination in advertising and promotional allowances (R. 7–8). The agreement and order were

approved by a hearing examiner (R. 10–12), and on January 16, 1959, the order was adopted by the Commission (R. 13; 55 F.T.C. 1065).[2]

On July 23, 1959, the Finality Act of 1959, 73 Stat. 243 (pp. 23a–28a, *infra*), became effective. The Finality Act amended the third and other paragraphs of Section 11 of the Clayton Act—which had provided for judicial enforcement of Commission orders only after they were once disobeyed—by establishing a new procedure whereby cease-and-desist orders issued by the Commission become final when affirmed on review in appellate courts or at the expiration of the time in which review may be sought. Violations of final orders are punishable by a civil penalty of up to $5000 per day for each offense, collectible in actions in the district courts. The 1959 Act made no explicit provision for cease-and-desist orders entered prior to 1959 other than those which were being litigated in appellate courts under the former procedures at the time of the statute's enactment.

On July 22, 1964, the Commission ordered an investigational hearing into charges that respondent had violated the 1959 consent order by granting discriminatory advertising and promotional allowances (R. 20–21). Respondent stipulated before a hearing examiner that it had violated the consent order by granting discriminatory allowances to customers in Chattanooga, Tennessee, and in Brooklyn, New York, and that the payments to these and "other favored cus-

[2] An inadvertent error in terminology appearing in the Commission's decision and order was subsequently corrected on joint motion of the parties (R. 15–16).

tomers" had not been made available on proportionally equal terms to all its other customers competing in the distribution of Jantzen products, as required by the cease-and-desist order (R. 66–68). The hearing examiner issued his report and certification to the Commission (R. 25–31). On April 12, 1965, after considering the entire record including the admissions in the stipulation, the Commission concluded that respondent's acts and practices violated the order (R. 61–64).

On April 23, 1965, the Commission applied, under the provisions of the third paragraph of Section 11 of the original Clayton Act, to the Court of Appeals for the Ninth Circuit to enforce the cease-and-desist order. The court of appeals sustained respondent's contention that the Commission's petition should be dismissed for lack of jurisdiction. The court held that the 1959 amendment repealed the authority of the Commission and the courts to enforce, under the former procedures, unreviewed cease-and-desist orders entered by the Commission before its effective date.

REASONS FOR GRANTING THE WRIT

The court of appeals held in this case that Congress in 1959 deprived the Federal Trade Commission of the power to obtain judicial enforcement of nearly 400 orders which were then outstanding and which had been issued by the Commission pursuant to its statutory duty to enforce provisions of the Clayton Act. This conclusion is, we submit, contrary to the obvious intent of the Congress which passed the Fi-

nality Act of 1959. It conflicts with the prevailing understanding of the Finality Act's effect and with the rule of construction established by the General Savings Statute, 1 U.S.C. 109. The decision has substantial practical significance for both the Commission and those subject to its pre-1959 Clayton Act orders.

1. The Commission was authorized by Section 11 of the Clayton Act to enforce compliance with various provisions of the Act by issuing cease-and-desist orders when, pursuant to appropriate proceedings, it found that the enumerated provisions had been violated. Prior to 1959, Section 11 provided no immediate sanction for the violation of such an order. Only after the Commission found that its order had been violated—*i.e.*, that, in addition to the violation giving rise to the order, the respondent had committed a second violation—could it, under the pre-1959 procedures, obtain a court order directing the respondent to comply with the Commission's order. See, *e.g.*, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470. Under this procedure, a respondent was subject to no direct sanction until his third violation, which was punishable by contempt proceedings.

The legislative history of the Finality Act of 1959 demonstrates conclusively that Congress' only intent was to provide a more effective method of enforcement. Experience had shown that the simpler enforcement procedures prescribed by the Wheeler-Lea Amendment of 1938 to Section 5 of the Federal Trade Commission Act, 52 Stat. 111, were more efficient. In the Finality Act, Congress adopted provisions almost identical to those in the 1938 Act. The title of the

Act plainly stated its purpose: "To amend Section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder * * *." This purpose was reflected in the legislative reports (S. Rep. No. 83, 86th Cong., 1st Sess. and H. Rep. No. 580, 86th Cong., 1st Sess.) and in the discussion on the floor of Congress (105 Cong. Rec. 12729–12735, 12810–12811, 12974, 13221).[3] The legislative history provides no support for any inference that Congress wished to weaken or reduce the Commission's powers with respect to its then outstanding orders. The decision below has that effect, however, because it construes the Finality Act as depriving the Commission of the sole avenue by which it could impose sanctions for violations of its orders—*i.e.*, by instituting enforcement actions in courts of appeals.

While recognizing that Congress' failure in 1959 to provide expressly for outstanding orders may have been "inadvertent" (p. 13a, *infra*), the court below concluded that "Congress may well have felt that this [*i.e.*, the elimination of enforcement procedures for pre-1959 orders] was a better disposition of old cases than to perpetuate the old system as to old orders" (p. 15a, *infra*). But since Congress provided no express substitute for the "old system" in 1959, the result of the court's speculation regarding Congress'

[3] Senator Sparkman, who introduced S. 726, 86th Cong., 1st Sess., which became the Finality Act, explained "* * * that the bill in nowise proposes any deviation from the original intent of Congress when it enacted the Clayton Act and the Federal Trade Commission Act." 105 Cong. Rec. 4465. See also 105 Cong. Rec. 12730, 12732–12733.

intent is to leave the Commission with no alternative other than to write off its pre-1959 orders and proceed anew against the respondents named therein. It is most unlikely, we submit, that Congress wished to relegate the Commission to new proceedings—in which the maximum penalty for violation of an unreviewed final order would be a civil fine—in cases where, before the passage of the Act, the respondents were subject to judicial decrees if they violated cease-and-desist orders entered against them. The threat of judicial enforcement is a meaningful deterrent, for a contempt sanction may fall heavily upon a corporate respondent and its officers. See, *e.g., In re Holland Furnace Co.,* 341 F. 2d 548 (C.A. 7), certiorari denied in part, 381 U.S. 924, affirmed in part, *sub nom. Cheff* v. *Schnackenberg,* No. 67, O.T., 1965, decided June 6, 1966. While it is doubtless true, therefore, that the pre-1959 procedure was unwieldy, it nonetheless armed the Commission with a deterrent against repeated violations which Congress should not be presumed to have silently withdrawn.

2. Nor does the language of the 1959 amendments compel the result reached by the court below. While it is true that the Finality Act substituted new procedures for those governing judicial review under former Section 11 of the Clayton Act, it did not explicitly deny the Commission the power to act with respect to existing orders in accordance with authority previously conferred. The language which effected the substitution of procedures is "[t]he third, fourth, fifth, sixth, and seventh paragraphs of such section

[Section 11 of the Clayton Act] are amended to read as follows: * * *" (p. 24a, *infra*). The words "are amended to read as follows," like any other terms in a statute, must be read in light of "common-sense, precedent, and legislative history." *United States* v. *Standard Oil Co.*, No. 291, O.T., 1965, decided May 23, 1966, slip opinion, p. 2. These standards all support a reading of the Finality Act which would give its substitution of remedies prospective effect only and would preserve the pre-existing procedures in cases involving pre-1959 orders. Such a construction would be consistent with the purpose of Congress, which was to strengthen, rather than weaken, the enforcement of Commission orders under the Clayton Act, and it would prevent the unreasonable result "plainly at variance with the policy of the legislation as a whole" (*Ozawa* v. *United States*, 260 U.S. 178, 194, quoted in *United States* v. *American Trucking Associations*, 310 U.S. 534, 543) which would follow from literal adherence to the words of the Finality Act. See also *Cabell* v. *Markham*, 148 F. 2d 737 (C.A. 2), affirmed, 326 U.S. 404, and authorities there cited; cf. *Federal Trade Commission* v. *Dean Foods Co.*, No. 976, O.T., 1965, decided June 13, 1966.

The construction rejected by the court below would also accord with the expressed understanding of this Court and the Court of Appeals for the District of Columbia Circuit regarding the effect of the 1959 Finality Act. In *Sperry-Rand Corp.* v. *Federal Trade Commission*, 288 F. 2d 403, the District of Columbia Circuit held that the new finality provisions did not apply to pre-amendment orders, noting that "[e]nforcement due to any violation of the consent order

which might occur is left to the provisions of the statute as they existed at the time the order was entered." 288 F. 2d at 406. And in *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, this Court observed, with respect to a pre-1959 order, that the only sanction available was that following from "violation of an enforcement order yet to be entered by an appropriate Court of Appeals * * *." 368 U.S. at 365.[4]

3. Moreover, even if the amending language of the Finality Act were read to repeal the pre-existing jurisdictional provisions, the General Savings Statute, 1 U.S.C. 109, would preserve the jurisdiction of the courts and the authority of the agency to enforce pre-1959 orders. That statute—enacted in 1871 (16 Stat. 432) and appearing as Section 13 of the Revised Statutes—provides (pp. 28a–29a, *infra*) that "[t]he repeal of any statute shall not have the effect to release or extinguish any * * * liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statue shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such * * * liability." Respondent was charged by the Commission with having incurred a liability in 1958 by violating the Clayton Act. Such a violation, under the then applicable law, meant that

[4] This Court did not advert to the circumstance, on which the court below relied (p. 12a, *infra*), that "the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act" so as to fall within the exception provided by Section 2 of the Finality Act. That was not, we submit, the basis of this Court's observation in *Broch*.

respondent could be directed to cease and desist by a Commission order which, if violated, could be enforced by a court.[5] The Commission's 1964 proceeding was, within the meaning of the General Savings Statute, a "proper action" for the enforcement of that liability, even though the Commission was also required to prove acts committed after the underlying statute had been amended. The court below erred in assuming that the proceeding instituted before it by the Commission was based entirely "on further violations occurring *after*" the adoption of the Finality Act in 1959 (p. 15a, *infra*). Although proof of those violations was a necessary condition for the grant of the relief requested by the Commission, the action was, in fact, the Commission's only means of carrying out the sanction which made its earlier order meaningful. If, on the other hand, the court below were correct in its application of the statute, the liability incurred in 1958 would be "extinguish[ed]" because no action to effectuate the Commission's remedy could ever be brought.

In *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, this Court held under the General Savings Statute that outright repeal of the War Risk Insurance

[5] An order of an administrative agency is a "liability" within the meaning of the General Savings Statute, even though there is no sanction for violation of such an order until it has been judicially enforced. See *National Labor Relations Board* v. *National Garment Co.*, 166 F. 2d 233 (C.A. 8), certiorari denied, 334 U.S. 845; *Eastern Coal Corp.* v. *National Labor Relations Board*, 176 F. 2d 131 (C.A. 4); *National Labor Relations Board* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (C.A. 6), certiorari denied, 335 U.S. 908; *National Labor Relations Board* v. *Mylan-Sparta Co.*, 166 F. 2d 485 (C.A. 6).

Act did not extinguish the government's preexisting liability or deprive the district courts of jurisdiction to enforce that liability. "[T]o strike down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and tends to defeat rather than further the legislative purpose." 344 U.S. at 390. The decision of the court below has the effect condemned in the *De La Rama* case because it deprives the courts of jurisdiction to enforce the only meaningful "liability" imposed by Section 11 of the Clayton Act prior to its amendment.

4. The decision below is of substantial legal and commercial importance. We are informed by the Commission that there are 438 pre-amendment orders under the Clayton Act now outstanding. Excluding those which were pending in or decided by the courts of appeals prior to the amendment, some 388 currently outstanding orders are affected by this case.[6] The status of these orders is of substantial concern to the respondents, to their competitors, and to the various industries in which they are involved.[7]

[6] This figure represents orders entered in separately docketed cases. A single docket may include more than one respondent firm. A preliminary check of a standard reference work confirms the continued existence of at least 336 separate corporate respondents.

[7] Among the major firms subject to recent orders are: *Benrus Watch Company, Inc.*, 49 F.T.C. 476 (1952) (Sec. 2(a), watches); *Goodyear Tire and Rubber Co., Inc.*, 50 F.T.C. 143 (1953), (Sec. 2(a), shoe soles and heels); *Helena Rubinstein, Inc.*, 52 F.T.C. 1267 (1956) (Sec. 2(d), 2(e), cosmetics); *General Foods Corp.*, 52 F.T.C. 798 (1956) (Sec. 2 (d) (e), food products); *The Borden Company*, 54 F.T.C. 563 (1957) (Sec. 2(a), milk products; *Schick Incorporated and Schick Services, Inc.*, 55 F.T.C. 665 (1958). (Sec. 2, Clayton Act and Sec. 5, Federal Trade

Among the affected orders are four which prohibit specified acquisitions under the anti-merger provisions of Section 7, forty-five which bar exclusive dealing arrangements in violation of Section 3, and one hundred and fifty which correct illegal price discrimination in violation of Section 2(a).

The court of appeals' assertion that its decision will not have any significant effect because the Commission may simply enter new orders if respondents violate pre-1959 orders (p. 15a, *infra*) is unsound. Proof of new violations of the statute may require relitigation of issues which have previously been resolved by consent or after an evidentiary hearing.[1] Enforcement under the old procedure, on the other hand, is not aimed at proving a second violation of the *statute*, but at proving a violation of the terms of the *order*. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54. In addition, the prohibitions contained in the Commission's orders need not be limited to prohibitions of the particular conduct which

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Commission Act, shaving products); *Ronson Corp.*, 55 F.T.C. 1017 (1959) (Sec. 2, Clayton Act and Sec. 5, Federal Trade Commission Act, tobacco lighters); *Sunkist Growers, Inc.*, 54 F.T.C. 1964 (1958) (Sec. 2(d), produce); *Piel Bros., Inc.*, 54 F.T.C. 1526 (1958) (Sec. 2(d), beer); *Libby-Owens-Ford Glass Co.*, 53 F.T.C. 1038 (1957) (Sec. 2(a), automotive safety glass). *International Paper Company*, 53 F.T.C. 1192 (1957) (paper); *Union Bag and Paper Corp., et al.*, 52 F.T.C. 1278 (1956) (packaging material); *The Vendo Co.*, 54 F.T.C. 253 (1957) (bottle vending machines); *Automatic Canteen Co. of America*, 54 F.T.C. 1831 (1958) (vending machines).

[1] *Res judicata* would obviously be unavailable in the case of consent orders. Whether it would bar relitigation of a defense in a case in which a respondent had failed to seek judicial review—which was, under the pre-1959 procedure, available without time limit—is uncertain.

led to the original offense, but may include similar commercial practices which might not otherwise be unlawful. Typical orders under Section 2(a) remedying unlawful price discrimination at the secondary line of competition have, since 1948, flatly prohibited further discriminations, without referring to injury to competition or requiring proof of it. *Federal Trade Commission* v. *Morton Salt Co., supra* at 54. Orders under Section 3 typically prohibit *any* arrangement barring customers from dealing in competitor's products, making it unnecessary to prove the statutory element of competitive injury. Finally, this Court has made clear that respondents are estopped from basing defenses and justifications in an enforcement proceeding upon facts which they had an opportunity to present in the original proceeding. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476–477. It is unclear whether this rule would apply if a *de novo* proceeding had to be instituted.

Paramount is the fact that in the Commission's view the availability of the remedy provided by the pre-1959 statute for violation of Commission orders acts as a significant deterrent to violations of such orders, and that the withdrawal of this deterrent by the decision below may hinder enforcement of the Clayton Act. This Court has observed that the Commission, not the courts, has been assigned the task of "develop[ing] that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy * * *." *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413.

The Commission believes that the decision below unduly restricts its mandate in that regard and that a resolution of the issue presented by this case is necessary to enable it to plan its future program for enforcement of the Clayton Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1966.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20021

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

February 4, 1966

Petition to Enforce an Order of the Federal Trade Commission

Before POPE, JERTBERG, and DUNIWAY, *Circuit Judges*

DUNIWAY, *Circuit Judge:*

The Federal Trade Commission seeks enforcement of a cease and desist order, issued by it on January 16, 1959 (55 F.T.C. 1065) and modified on March 26, 1959.[1] No proceedings relating to the order were begun by either party in this court or any court until the present petition was filed on April 22, 1965. It arises from a proceeding begun by the Commission

[1] The order was issued pursuant to a written consent, whereby Jantzen waived any further procedural steps, the making of findings of fact and conclusions of law, and all right to contest the validity of the order.

on July 22, 1964, based upon the Commission's belief that Jantzen might not be complying with the order. At a prehearing conference on November 23, 1964, Jantzen admitted certain violations of the order. At the same time Jantzen took the position (1) that the order is invalid and (2) that, if it is valid, there is no method provided by law for its enforcement. It presents the same contentions here. We hold that we have no jurisdiction in this proceeding, and therefore do not pass upon the first question.

The cease and desist order followed the filing of a Commission complaint that charged violation of Section 2(d) of the Clayton Act, 38 Stat. 730 (1914) as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) 1964). The Commission was authorized to issue such an order by Section 11 of the Clayton Act, 38 Stat. 734 as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 21 (1958). We therefore refer to it as a "Clayton Act order," to distinguish it from orders issued by the Commission in the course of its duty to enforce the Federal Trade Commission Act, 38 Stat. 717, 719, § 5 (1914), 15 U.S.C. § 45, as amended. We refer to these as F.T.C. Act orders.

Until 1938, the method of enforcing both types of orders was essentially the same. Section 11 of the Clayton Act, *supra*, as it read when the order here involved was issued, contained 7 paragraphs. The first authorized the Commission to enforce, *inter alia*, section 2. The second set up a procedure for the issuance by the Commission and service of a complaint for a hearing, and, upon finding violation, for the issuance of a cease and desist order. The third dealt with enforcement of such an order, and read, in pertinent part, as follows:

> "If such person fails or neglects to obey such order of the Commission * * * while the same is in effect, the Commission * * * may

apply to the United States Court of Appeals * * * for the enforcement of its order * * *. [T]he court * * * shall have power to make and enter * * * a decree affirming, modifying, or setting aside the order of the commission * * *. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *." (64 Stat. 1127–8)

The fourth gave the respondent a similar right to petition the Court of Appeals for review of the order, without limit as to the time within which to do so. The remaining 3 paragraphs are not material to our problem.

Section 5 of the Federal Trade Commission Act, *supra*, contained, in its third, fourth and fifth paragraphs, substantially identical provisions regarding F.T.C. orders.

No penalty attached to the violation of either type of order. In order to obtain an enforcing order in the Court of Appeals, a second violation had to be shown. This was done, as in this case, by the Commission's ordering an investigation, appointing a hearing officer, and, usually, holding a hearing.[2] (See the Commission's Rules at 16 C.F.R. § 1.35.) If a violation was found, the Commission then sought enforcement in the Court of Appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. Such a decree had the force of an injunction, and, if thereafter the Commission found further violation, it could bring the respondent before the court for punishment for contempt.

Not surprisingly, this very clumsy and time consuming procedure was severely criticized, and in 1938

[2] A hearing was not necessary here, because of Jantzen's admissions and stipulation of violation at a pre-hearing conference.

the Congress responded by adopting the Wheeler-Lea Act, 52 Stat. 111, section 3 of which (52 Stat. 111–114) amended section 5 of the Federal Trade Commission Act. That section (3) states: "Section 5 of such Act * * * is amended to read as follows: * * *." The amended section contains 12 paragraphs designated (a) through (*l*). Paragraph (b) retains substantially the same provision for the issuance of cease and desist orders as was contained in the old third paragraph. Paragraph (c), however, is different. It provides for a petition by the respondent to the Court of Appeals for review of the order. The petition must be filed within sixty days from the date of service of the order. The court has similar powers to those conferred by the old section, but with the added power to decree enforcement. In general, the new paragraph (c) is comparable to the old fifth paragraph of the section (38 Stat. 720). The former fourth paragraph, providing for a petition by the Commission, is omitted. Paragraphs (g), (h), (i), and (j) provide for the finality of Commission orders—either when the period in which to petition for review expires or, if there be such a petition, then within a fixed time after the completion of subsequent court and Commission proceedings. All of this is new, as is paragraph (*l*). It subjects violators of final orders to "a civil penalty of $5000 for each violation." This has been since amended (64 Stat. 21, 1950) to provide that each separate violation shall be a separate offense, and, if the violation is a continuing one, each day of its continuance is a separate offense.

The normal rule is that when an Act amends a previous Act "to read as follows" this is as much an express repeal of those provisions which are

omitted[3] as it is an express enactment of those provisions which are added and a continuation in effect, rather than a repeal and new enactment, of those provisions which remain unchanged.

No doubt in recognition of this rule, the Wheeler-Lea Act deals with its effect on pending cases. Section 5(a) of the amending Act reads:

> "(a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5(c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act." (52 Stat. 117)

Thus, if the order before us were an F.T.C. order, we would have no problem. The order would be final and enforcible via the civil penalty route, and the Commission would not be here.

But Clayton Act orders were not affected by the Wheeler-Lea Act. They are, however, affected by the so-called Clayton Finality Act, 73 Stat. 243

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[3] No doubt the Congress could add to each such amending statute a provision that "everything omitted by this Act from the statute (or section) that is hereby amended is hereby repealed," or other words to like effect, but the law does not require such laborious absurdities. See *Heinze* v. *Butte & Boston Consol. Mining Co.*, 9 Cir., 1901, 107 Fed. 165, 167; *United States* v. *Kelly*, 9 Cir., 1899, 97 Fed. 460, 462; *United States* v. *Baker*, 3 Cir., 1961, 293 F. 2d 613, 617–18; *H. Rouw Co.* v. *Crivella*, 8 Cir., 1939, 105 F. 2d 434, 436; *Rowan* v. *Ide*, 5 Cir., 1901, 107 Fed. 161; *Columbia Wire Co.* v. *Boyce*, 7 Cir., 1900, 104 Fed. 172, 174; Endlich, *Interpretation of Statutes*, § 196 (1888); Crawford, *Statutory Construction* §§ 304, 305, (1940); 1 Sutherland, *Statutory Construction* § 1932 (3d ed. 1943); 82 C.J.S. Statutes, § 294, pp. 503–4; *cf. Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 502–6; *Murdock* v. *City of Memphis*, 1875, 87 U.S. (20 Wall.) 590, 617; *Stewart* v. *Kahn*, 1870, 78 U.S. (11 Wall.) 493, 502.

(1959); 15 U.S.C. § 21 (1964). In substance, it does for Clayton Act orders what the Wheeler-Lea Act did for F.T.C. orders. The technique of amendment is the same. It provides, in pertinent part:

> "(a) the first and second paragraphs of section 11 of the [Clayton] Act * * * are hereby redesignated as subsections (a) and (b) of such section, respectively."

It then adds a sentence to the second paragraph, which it designates as (b), dealing with proceedings before the Commission leading to issuance of a cease and desist order. It continues:

> "(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:
>
> (c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside * * *." (73 Stat. 243)

It is unnecessary to reproduce the balance of the amended section. It is almost verbatim the same as section 5 of the Federal Trade Commission Act as amended by the Wheeler-Lea Act. The effect of the statute is to produce a revised section 11 of the Clayton Act, containing 12 paragraphs designated (a) through (*l*), and providing the same method of review at the instance of the respondent only, the same power of the court, the same time limitation, the same rules as to finality, and the same civil penalties for violations as does amended section 5 of the Federal Trade Commission Act.

The former third paragraph which we have quoted in part earlier in this opinion is omitted in its entirety. That is the paragraph which provided for the type of proceeding to enforce, brought here by the Commission, that is now before us. For reasons already stated, we are of the opinion that the amendment, by omitting the third paragraph, repealed it.

Like the Wheeler-Lea Act, the Finality Act contains a paragraph relating to prior cases, which reads:

> "SEC. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as they existed on the day preceding the date of enactment of this Act." (73 Stat. 245–46)

It will be noted that, unlike the corresponding section 5(a) of the Wheeler-Lea Act, this section does not deal with cease and desist orders issued before its effective date, nor provide for their becoming final within the meaning of the amended Act. It deals solely with proceedings begun in a Court of Appeals, which is the subject to which the former third and fourth paragraphs related. Thus the third paragraph is expressly continued in effect for this very limited purpose, namely, the completion of proceedings for enforcement initiated by the Commission in a Court of Appeals. To us, this is a strong indication that the Congress knew, and intended, that it was repealed for other purposes. The Finality Act is closely modeled on the Wheeler-Lea Act, which makes the

difference between section 2 of the Finality Act and section 5(a) of the Wheeler-Lea Act even more significant.

It is significant, too, we think, that immediately after the adoption of the Finality Act, the Commission itself took the position that existing Clayton Act orders would become final within 60 days, under the new law, just as under the Wheeler-Lea Act, even though the Finality Act does not contain the language to that effect that appears in section 5(a) of the Wheeler-Lea Act. The Court of Appeals for the District of Columbia Circuit refused to accept this view. *Sperry Rand Corp.* v. *FTC*, 1961, 288 F. 2d 403; *Schick Inc.* v. *FTC*, 1961, 288 F. 2d 407; *FTC* v. *Nash-Finch Co.*, 1961, 288 F. 2d 407. In its briefs in those cases, the Commission strongly urged that the former enforcement procedure, which it now seeks to invoke, was no longer in effect.

The Commission's present position is directly contrary to the position that it took then. This does not necessarily mean that its present view is wrong.* It relies, first, upon the established rule of statutory construction, that repeals by implication are not favored. That rule, however, does not apply here. As we have already indicated, we think that the repeal in this

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*We think that it does mean, however, that we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any deference to the Commission's views, it is to those that were contemporaneous with the enactment of the statute, the adoption of which it helped to procure. (*Cf. FTC* v. *Mandel Bros., Inc.*, 1959, 359 U.S. 385, 391; *Norwegian Nitrogen Prods. Co.* v. *United States*, 1933, 288 U.S. 294, 315.)

case was express. (See also, *Sperry Rand Corp.* v. *F.T.C., supra.*)[5]

It next urges that the purpose of the Clayton Finality Act was to establish, for Clayton Act orders, the same method of enforcement as was already applicable under the Wheeler-Lea Act to F.T.C. orders. There is no doubt that that was the purpose.[6] There

[5] Of the five cases principally relied upon by the Commission, three are not even closely in point. Each deals with a supposed conflict between two separate statutes or sections, adopted or amended at different times, not with a statute expressly amending a particular statute or section to read in a different way. (*Mercantile Nat'l Bank* v. *Langdeau*, 1963, 371 U.S. 555, 565–67; *United States* v. *Borden Co.*, 1939, 308 U.S. 188, 198–201; *Liets* v. *Flemming*, 6 Cir., 1959, 264 F. 2d 311, 313.) Two others are more closely in point, but do not involve the effect of the omission, in the amending statute, of a provision that was contained in the same statute before the amendment. They both hold that, insofar as former language is retained in the amended section, there has not been a repeal and a new enactment, but only the continuance in effect of the old provisions that are thus retained. (*Posadas* v. *National City Bank*, 1936, 296 U.S. 497, 506; *Rithole* v. *March*, D.C., Cir., 1939, 105 F. 2d 937.) *Rithole* is the converse of this case. It deals with the Wheeler-Lea Act, and holds that, because the portion of section 5 of the Federal Trade Commission Act authorizing the Commission to issue cease and desist orders was retained in the amended section, there was no repeal and new enactment of that portion, but that it continued in effect. We quite agree, but that does not answer the question here posed.

[6] The title of the Clayton Finality Act reads:

"AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes." (73 Stat. 243)

The House Report accompanying the Act, H.R. Rep. No. 580, 86th Cong., 1st Sess. 4, quoted in *FTC* v. *Henry Broch & Co.*, 1962, 368 U.S. 360, at 365–66 n. 6, says:

"The Clayton Act, in its present enforcement procedures, permits a person to engage in the same illegal prac-

is also no doubt that, as to future orders, that purpose was fully accomplished. But it is equally clear, as we have already shown, that the Congress dealt with orders already outstanding in a different manner in the two Acts. In the case of F.T.C. Act orders, it made the new remedy fully applicable to existing orders. In the case of Clayton Act orders, it did not do

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tices three times before effective legal penalties can be applied as a result of action by the commission or board vested with jurisdiction. First, in order to issue and serve a cease-and-desist order initially, the commission or board must investigate and prove that the respondent has violated the prohibitions of the Clayton Act. No provision of the Clayton Act, however, makes the commission or board's cease-and-desist order final in the absence of an appeal by the respondent for judicial review. At the present time, the Clayton Act contains no procedure by which the commission or board may secure civil penalties for violations of its orders.

"Second, before the commission or board may obtain a court ruling that commands obedience to its cease-and-desist order, it must again investigate and prove that the respondent has violated both the order and the Clayton Act. The jurisdiction of the court of appeals, under the present provisions of Clayton Act section 11, cannot be invoked by the commission or board unless a violation of the cease-and-desist order is first shown.

"Third, enforcement of the court's order must be secured in a subsequent contempt proceeding, which requires proof that new activities of the respondent have violated the court's order. This entails a third hearing before the commission and a review thereof by the court of appeals.

"In contrast, the procedures that are contained in the Federal Trade Commission Act for enforcement of cease-and-desist orders issued thereunder are much simplier and more direct. A cease-and-desist order issued pursuant to section 5 of the Federal Trade Commission Act, as amended, becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time."

this. Instead, it expressly preserved the old methods, but only as to a limited class of such orders.

The Commission says that it has case authority for its position. It cites two cases in which enforcement of a pre-Finality Act order was decreed, without opinion: *FTC* v. *Pacific Gamble Robinson Co.*, 9 Cir., 1962, No. 18260, not reported, and *FTC* v. *Benrus Watch Co.*, 2 Cir., 1962, No. 27752, not reported. The order was not opposed in either case. These cases are not authority on the question.[7] It also cites two cases involving investigations by it to determine whether pre-Finality Act orders were being obeyed: *Wanderer* v. *Kaplan*, D.D.C., 1962, CCH Trade Cases, ¶70,535; *Nash-Finch Co.* v. *FTC*, D. Minn., 1964, 233 F. Supp. 910. Neither of these cases involved the jurisdiction of a Court of Appeals to enforce such an order. Such dicta as they contain is hardly authoritative on the question.

Next, it cites dicta in *Sperry Rand Corp.* v. *FTC*, *supra*,[8] and language in *FTC* v. *Henry Broch & Co.*, *supra*, fn. 6.[9] It is perfectly clear that the question

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[7] *Brown Shoe Co.* v. *United States*, 1962, 370 U.S. 294, 307; *Cross* v. *Burke*, 1892, 146 U.S. 82, 87.

[8] There the court said:

"Enforcement due to any violation of the consent order which might occur is left to the provisions of the statute as they existed at the time the order was entered. It follows that the basis for the relief sought, namely, review of the order of November 3, 1958, and of the order of the Commission denying petitioner's motion to modify or set aside the order of November 3, 1958, disappears." (288 F. 2d at 406–7)

[9] The language relied on is:

"In considering *Broch's* challenge to paragraph (2) it is necessary to observe that the 1959 amendments to § 11 of the Clayton Act—which substitute for the Clayton Act provisions for enforcement of administrative orders those in § 5 of the Federal Trade Commission Act—do not apply

here presented was not before the court in either case. We have already discussed *Sperry Rand Corp.* The *Broch* case also involved a pre-Finality Act order, issued December 10, 1957. The respondent petitioned for review, and the Seventh Circuit set the order aside on December 11, 1958 (*Henry Broch & Co.* v. *FTC,* 261 F. 2d 725). The Commission sought and obtained certiorari, and the Supreme Court reversed on June 6, 1960 (*FTC* v. *Henry Broch & Co.,* 1960, 363 U.S. 166). On remand, the Seventh Circuit modified the order, and affirmed it as modified on November 3, 1960 (*Henry Broch & Co.* v. *FTC,* 285 F. 2d 764). The Commission again sought certiorari, and again the Supreme Court granted it, and reversed (368 U.S. 360). Thus, when the Finality Act was passed in 1959, the *Broch* case was one of those in which a proceeding had been initiated under the fourth paragraph of section 11 of the Clayton Act. It falls squarely within the language of Section 2 of the Finality Act, and the Supreme Court's language, as applied to it, is clearly correct. As applied to this case, which does not fall within Section 2, the language is not even applicable dictum.

Finally, the Commission asserts that, unless its views are accepted, "forty-five years of Clayton Act enforcement and almost 400 orders to cease and desist

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to enforcement of the instant order. In consequence, Broch cannot be subjected to penalties except for violation of an enforcement order yet to be entered by an appropriate Court of Appeals, to be predicated upon a determination that some particular practice of Broch violated the Commission's order. Thus Broch is not, by virtue of that order, presently acting under the risk of incurring any penalty without further administrative and judicial consideration and interpretation, despite the fact that he has already received determination of his petition for review. *Federal Trade Comm'n* v. *Ruberoid Co.,* 343 U.S. 470, 477–480." (368 U.S. at 364–65)

would be wiped from the books." It urges that this result is quite contrary to the congressional intent, which was, as we have seen, to strengthen enforcement by the Commission of the Clayton Act. It says that Congress "did not intend to grant amnesty to the almost 400 law violators under order." To these arguments there are two answers, one legal, the other practical.

The legal effect of the Commission's argument is to ask us to insert into the Finality Act something that is not there. In *Sperry Rand Corp., supra,* the Commission asked the court, in substance, to insert into the Finality Act the provisions of section 5(a) of the Wheeler-Lea Act. Indeed, it had tried to accomplish the same thing by press release. The court quite properly declined to do what the Commission asked. (See 288 F. 2d at 406.) What we are now asked to do, in substance, is to insert into section 2 of the Finality Act a provision making it applicable to outstanding cease and desist orders as to which proceedings had *not* been initiated, before the date of enactment, under the third and fourth paragraphs of the former section 11 of the Clayton Act, and this in spite of the fact that the section applies only where such proceedings, *have* been initiated. Whether the omission of such a provision was intentional, as it may have been, or inadvertent, as it may also have been, is immaterial. It is not the business of courts, under the guise of construction, to put into a statute what Congress has left out.[10]

The practical answer to the Commission's argument is clear. The Commission is indulging in hyperbole. We do not, by our holding, wipe forty-five

[10] *Hanover Bank* v. *Commissioner*, 1962, 369 U.S. 672, 677–678; *Iselin* v. *United States*, 1926, 270 U.S. 245, 251; *Ebert* v. *Poston*, 1925, 266 U.S. 548, 554.

years of Clayton Act enforcement and almost 400 orders to cease and desist from the books, nor do we grant amnesty to any law violator, much less to 400. The orders are still there, and still as valid as they ever were. Part of the Commission's function has always been to educate and to persuade. The orders, and the Commission's opinions and findings on which they are based, are just as authoritative and persuasive as they ever were. There is a presumption that people obey the law; we would suppose that it applies to obedience to FTC orders. The fact that there are 400 orders outstanding from forty-five years of enforcement, none of which the Commission has yet sought to enforce, is somewhat persuasive that the presumption is a valid one.

Morover, as the Commission points out in its brief, the former enforcement procedures were "somewhat inadequate," since "no meaningful sanctions were provided for enforcement of cease and desist orders." The Commission says:

> "Senator Sparkman, speaking on the floor of the Senate in 1957, commented (103 Cong. Rec. 690): 'In this light it is readily understandable why contempt proceedings to enforce a Clayton Act order have been successful only twice since 1940.' "

See also fn. 6, *supra*. We cannot see any good reason why the Commission is so desirous of perpetuating so poor a method of enforcement,[11] with its requirement

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[11] The Commission, in its brief, says that the system that it here seeks to perpetuate was characterized, in Congressional hearings as "ineffectual; cumbersome; lacking teeth; awkward, slow and without meaningful sanction; intolerable, laborious, time consuming, very expensive and entirely unnecessary; inadequate; ponderous; shocking; wasteful and uneconomic," and its enforcement of its orders under that system as "handicapped, hampered and weakened," leaving the Commission

that three successive violations be found before one can be punished. (*FTC* v. *Ruberoid Co.*, 1952, 343 U.S. 470). All that the Commission has to do where it finds a violation of the Clayton Act that is also a violation of an old cease and desist order is to enter a new cease and desist order. Such an order will give the Commission the full benefit of the Finality Act, and after only two bites at the apple instead of three. Congress may well have felt that this was a better disposition of old cases than to perpetuate the old system as to old orders. This, we think, is the result of what Congress did.

In its reply brief, the Commission suggests, for the first time, in a footnote, that the General Savings Statute, 61 Stat. 635 (1947), 1 U.S.C. § 109, preserves the remedy that it seeks.[12] We think not. This proceeding is not based upon a violation that occurred *before* the Finality Act was adopted, but on further violations occurring *after* its adoption in 1960 and 1962. (See *FTC* v. *Ruberoid Co.*, *supra*.) Thus there is not here involved a "penalty, forfeiture or liability" incurred under the former statute. Here, we deal with a statute which formerly conferred jurisdiction on this court, and which, except as to a limited class of cases, of which this is not one, has

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"poorly equipped to discharge its responsibilities," and leading to "diminution of the intended purpose" of the Clayton Act. We find it not surprising that Congress did not choose to perpetuate such an obviously objectionable system. We also find it somewhat surprising that the Commission is now asking us, by a bit of judicial legerdemain, to recreate it.

[12] "§ 109. *Repeal of statutes as affecting existing liabilities.* The repeal of any statutes shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability * * *."

been repealed. *Cf. De La Rama S.S. Co. v. United States*, 1953, 344 U.S. 386, 390. Moreover, the violations which, had they occurred before the enactment of the new statute, were a prerequisite to our jurisdiction, are, under the new statute, the basis for a new cease and desist order, enforcible by what the Commission says is a better method. *Cf. United States v. Obermeier*, 2 Cir., 1950, 186 F. 2d 243, 251–55, *cert. denied*, 1951, 340 U.S. 951.

The petition is dismissed for want of jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20,021

FEDERAL TRADE COMMISSION, PETITIONER

v.

JANTZEN, INC., RESPONDENT

DECREE

Before: POPE, JERTBERG and DUNIWAY, *Circuit Judges*

This cause came on to be heard upon the petition of the Federal Trade Commission, filed April 22, 1965 to review an order of the Federal Trade Commission issued by it on April 12, 1965. The Court heard argument of respective counsel on January 14, 1966 and has considered the briefs and transcript of record filed in the cause. On February 4, 1966, the Court being fully advised in the premises handed down its decision,

In conformity thereto it is hereby Ordered, adjudged and decreed by the United States Court of Appeals for the Ninth Circuit that the petition to review in above cause be and hereby is dismissed for want of jurisdiction.

A true copy:

Attest: April 14, 1966,

WILLIAM B. LUCK, *Clerk,*

By:

WILLIAM E. WILSON, *Chief Deputy.*

Filed Feb. 4, 1966.

WM. B. LUCK, *Clerk.*

APPENDIX C

1. Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. (1958 ed.) 21 provided prior to July 23, 1959, as follows:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by

the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the record in such hearing shall have been filed in a United States court of appeals, as hereinafter provided, the Commission or Board may at any time, upon such notice, and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall file the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the application the court shall cause notice thereof to be

served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission or Board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission or Board. The findings of the Commission or Board as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission or Board, the court may order such additional evidence to be taken before the Commission or Board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or Board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 1254 of Title 28.

Any party required by such order of the Commission or Board to cease and desist from a violation charged may obtain a review of such order in said United States court of appeals by filing in the court a written petition praying that the order of the Commission or Board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court

to the Commission or Board and thereupon the Commission or Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission or Board as in the case of an application by the Commission or Board for the enforcement of its order, and the findings of the Commission or Board as to the facts, if supported by substantial evidence, determined as provided in section 1009(e) of Title 5, shall in like manner be conclusive.

Upon the filing of the record with it the jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

Such proceedings in the United States court of appeals shall be given precedence over cases pending therein, and shall be in every way expedited. No order of the Commission or Board or the judgment of the court to enforce the same shall in anywise, relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the Commission or Board under this section may be served by anyone duly authorized by the Commission or Board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said

complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

2. The Finality Act of 1959, Public Law 86-107, 73 Stat. 243 [15 U.S.C. 21], provides:

AN ACT

To amend section 11 of the Clayton Act to provide for the more expeditious enforcement of cease and desist orders issued thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the first and second paragraphs of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21), are hereby redesignated as subsections (a) and (b) of such section, respectively.

(b) The last sentence of the second paragraph of such section which has been hereby redesignated as subsection (b) is amended to read as follows: "Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it

under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section."

(c) The third, fourth, fifth, sixth, and seventh paragraphs of such section are amended to read as follows:

"(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the

question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the commission or board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission or board shall be exclusive.

"(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

"(f) Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorised by the commission or board, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

"(g) Any order issued under subsection (b) shall become final—

"(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission or board has been affirmed,

or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) upon the denial of a petition for certiorari, if the order of the commission or board has been affirmed or the petition for review has been dismissed by the court of appeals; or

"(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission or board be affirmed or the petition for review be dismissed.

"(h) If the Supreme Court directs that the order of the commission or board be modified or set aside, the order of the commission or board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(i) If the order of the commission or board is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission or board was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission or board shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission or board for a re-

hearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission or board rendered upon such rehearing shall become final in the same manner as though no prior order of the commission or board had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person who violates any order issued by the commission or board under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission or board each day of continuance of such failure or neglect shall be deemed a a separate offense."

Sec. 2. The amendments made by section 1 shall have no application to any proceeding initiated before the date of enactment of this Act under the third or fourth paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 734, as amended; 15 U.S.C. 21). Each such proceeding shall be governed by the provisions of such section as

they existed on the day preceding the date of enactment of this Act.

3. The General Savings Statute, R.S. 13, as amended, 1 U.S.C. 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

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